No. 88-124

(3)

In the Supreme Court of the United States

OCTOBER TERM, 1988

Court, U.S.
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LYNN L. BREININGER, PETITIONER

v.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 6

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Act preempts federal court jurisdiction over a union member's claims that his union breached its duty of fair representation and violated the Labor Management Reporting and Disclosure Act by discriminating against him in job referrals.

2. Whether a union's refusal to refer a member to jobs, as a result of his political opposition to the union's leadership, gives rise to a cause of action under Sections 101(a)(5), 102, and 609 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. 411(a)(5), 412, and 529.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Respondent Sheet Metal Workers Local Union No. 6 (the Union) represents sheet metal workers in a multi-employer bargaining unit in the Toledo, Ohio, area. In a collective bargaining agreement, the Union has agreed to refer sheet metal workers to employers in response to their requests.[1] The Union attempts to honor an employer's re-

[1] Article V of the collective bargaining agreement provides:

> The Union agrees to furnish upon request by the Employer duly qualified journeymen and apprentice sheet metal workers in sufficient numbers as may be necessary to properly execute work contracted for by the Employer in the manner and under the conditions specified in this Agreement. Employers agree to confirm, in writing, to Local No. 6 when requesting employees. The Union

quest for particular employees (Pet. App. A6). However, if the employer does not request particular individuals or if individuals requested are unavailable, the Union refers workers from an "out-of-work list" (*id.* at A5-A6). The Union begins at the top of the list and attempts to contact workers in the order they appear. A member who is contacted may accept the employment or decline and retain his place on the list. The Union continues down the list until it has obtained a sufficient number of workers to satisfy the employer's request. *Id.* at A6. A sheet metal worker is not required to seek work exclusively through the out-of-work list, but rather may solicit employment directly from sheet metal contractors (*id.* at A5).

In this action, petitioner Breininger, a member of the Union, has alleged that the Union has refused to honor employer requests for his services and has unjustifiably passed him over in making referrals from the out-of-work list. Pet. App. A18-A20. His amended complaint states two legal theories. First, the complaint alleges that the Union has breached its "duty of fair representation" by acting "arbitrarily, discriminatorily, and/or in bad faith" in denying petitioner referrals for employment and refusing to process his internal union grievances challenging this mistreatment (Pet. App. A18-A20). Second, the complaint alleges that petitioner opposed the incumbent union leadership in an election campaign and that his discriminatory treatment in job referrals "has been part of widespread, improper discipline for political opposition in violation of" Sections 101(a)(5) and 609 of the Labor Management Reporting and Disclosure Act (LMRDA), 29

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agrees not to delay the referral of employees because of delays in mailing the request.

If the Union does not provide enough workers within 48 hours, an employer may fill the positions itself.

U.S.C. 411(a)(5) and 529 (*id.* at A21). The Union has denied that it has engaged in any discrimination against petitioner.

2. After discovery, the district court granted a motion by the Union for summary judgment and dismissed the complaint (Pet. App. A4-A10). The court held that all of petitioner's claims were within the exclusive jurisdiction of the National Labor Relations Board (NLRB). Applying the general rule of preemption set out in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), the district court determined that "discrimination in hiring hall referrals constitutes an unfair labor practice under" Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(b)(1)(A), 158(b)(2), and concluded that "[t]he NLRB has exclusive jurisdiction over discrimination in hiring hall referrals." Pet. App. A9.

3. In a brief *per curiam* opinion, the court of appeals affirmed (Pet. App. A1-A3). The court of appeals agreed with the district court that "union discrimination in job referrals is a matter within the exclusive jurisdiction of the NLRB" (Pet. App. A2), adding that it was "of no consequence that the union's allegedly discriminatory referral policies are described as a breach of the NLRA's duty of fair representation or as a violation of the LMRDA's bill of rights" (*ibid.*). The court of appeals also concluded that petitioner's fair representation claim was insufficient because petitioner had not "affirmatively alleg[ed] that his *employer* breached the collective bargaining agreement" (*ibid.*).

Finally, the court of appeals ruled that petitioner's LMRDA claim was without merit on the ground that "[d]iscrimination in the referral system * * * does not constitute 'discipline' within the meaning of LMRDA" (Pet. App. A3). Relying on *Finnegan* v. *Leu*, 456 U.S. 431 (1982), the court stated that the LMRDA was "intended to

secure the rights of members in their status as union members and does not secure other rights related to a member's employment." Pet. App. A3. The court concluded that "[h]iring hall referrals are not a function of union membership since referrals are available to non-members as well as to members" (*ibid.*).

DISCUSSION

The court of appeals' holding that the NLRA preempts federal jurisdiction over petitioner's fair representation and LMRDA claims conflicts with decisions of this Court, other courts of appeals, and other panels of the Sixth Circuit. We believe that further review by this Court is warranted to resolve this conflict. In our view, the court of appeals also erred in concluding that the reasoning of *Finnegan* v. *Leu, supra,* forecloses petitioner's LMRDA claim, as that claim was expressed in the complaint.

1. *Garmon, supra,* states the general rule regarding the scope of the NLRB's exclusive jurisdiction (359 U.S. at 245):

> When an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board * * *.[2]

As both lower courts found, petitioner's fair representation and LMRDA claims fall within the scope of this general rule. Petitioner has alleged that the Union denied him referrals because of his intra-union political activity.

[2] Accord, *e.g., Local 100, United Ass'n of Journeymen* v. *Borden,* 373 U.S. 690, 697 (1963); *Iron Workers* v. *Perko,* 373 U.S. 701, 705 (1963); *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 302 (1971); *Farmer* v. *United Brotherhood of Carpenters,* 430 U.S. 290, 305 (1977).

If it occurred, such discriminatory conduct would at least arguably violate Section 8(b)(1)(A) of the NLRA, 29 U.S.C. 158(b)(1)(A), which prohibits a union both from restraining or coercing employees in the exercise of their rights to engage in union activity and from breaching its duty of fair representation.[3]

However, *Garmon*'s general rule is not absolute. This Court has recognized exceptions for various categories of cases as to which "it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB." *Vaca* v. *Sipes,* 386 U.S. 171, 179 (1967). See *Farmer* v. *Carpenters,* 430 U.S. at 296-297. The court of appeals erred, in our view, when it failed to recognize that each of the claims set forth in petitioner's complaint was subject to a well-established exception to the *Garmon* rule.

a. In *Vaca* v. *Sipes, supra,* an employee who had been discharged by his employer claimed that his union had breached its duty of fair representation by failing to exhaust contractual grievance procedures to obtain his reinstatement. The Court held that this claim was not within the NLRB's exclusive jurisdiction—even though the Board had previously characterized a breach of the duty of fair representation as an unfair labor practice under the NLRA. The Court reasoned that "[a] primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that

[3] *Local 100, United Ass'n of Journeymen* v. *Borden,* 373 U.S. 690, 697 (1963). See *Radio Officers' Union* v. *NLRB,* 347 U.S. 17, 40 (1954) (NLRA designed "to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood"); *Vaca* v. *Sipes,* 386 U.S. 171 (1967) (assuming breach of duty of fair representation is arguably subject to the NLRA); pp. 9-10, *infra.*

purpose—is not applicable to cases involving alleged breaches of the union's duty of fair representation." 386 U.S. at 180-181.[4] The Court also found that the duty of fair representation was a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law" (*id.* at 182). Noting that the Board's General Counsel has unreviewable discretion to refuse to institute unfair labor practice proceedings, the Court was unwilling to assume that Congress intended to deny employees their traditional judicial remedy for a breach of the duty of fair representation. *Id.* at 183. Finally, the Court cited "intensely practical considerations" in support of its conclusion that fair representation claims were not preempted (*ibid.*). Claims that a union had breached its duty of fair representation would often arise in employees' suits to enforce collective bargaining agreements, the Court explained, so that it would be anomalous and unwieldy to preclude courts from adjudicating those fair representation issues in such actions. *Id.* at 183-187.

Since *Vaca* v. *Sipes*, this Court, other courts of appeals, and other panels of the Sixth Circuit have agreed that fair representation claims are not within the NLRB's exclusive jurisdiction. *E.g.*, *Communications Workers* v. *Beck*, No. 86-637 (June 29, 1988), slip op. 5-6; *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees* v. *Lock-*

[4] The Court explained that courts had developed the fair representation doctrine before the Board acquired statutory jurisdiction over union activities and before the Board first ruled that breaches of the duty of fair representation were unfair labor practices; that, rather than developing the fair representation doctrine itself, the NLRB had adopted that doctrine as it had been applied in the courts; and that there was doubt as to whether the Board had any more expertise than courts with respect to issues arising in fair representation cases. *Id.* at 181.

ridge, 403 U.S. 274, 299 (1971); *Storey* v. *Local 327, International Brotherhood of Teamsters*, 759 F.2d 517 (6th Cir. 1985); *Journeymen Pipe Fitters Local 392* v. *NLRB*, 712 F.2d 225, 228-229 (6th Cir. 1983); *Lewis* v. *Local Union No. 100 of the Laborer's International Union*, 750 F.2d 1368, 1375-1377 (7th Cir. 1984); *In re Carter*, 618 F.2d 1093, 1104 (5th Cir. 1980); *Beriault* v. *Local 40, Super Cargoes & Checkers*, 501 F.2d 258, 263-265 (9th Cir. 1974); *Smith* v. *Local No. 25, Sheet Metal Workers Int'l Ass'n*, 500 F.2d 741, 745-749 (5th Cir. 1974). To our knowledge, no other court has held that a properly pleaded fair representation claim is preempted by the NLRA.[5]

The grounds advanced by the court of appeals to justify its contrary decision are not well founded:

First, court jurisdiction over fair representation claims is not limited to cases in which an employee "affirmatively allege[s] that his *employer* breached the collective bargaining agreement" (Pet. App. A2). In *Communications Workers* v. *Beck, supra,* this Court upheld jurisdiction over a fair representation claim although no allegation of employer breach was or could have been made. And in *Lockridge,* 403 U.S. at 299, the Court observed, "[A]n action seeking damages for injury inflicted by a breach of a union's duty of fair representation [is] judicially cognizable in any event, that is, even if the conduct complained of [is] arguably protected or prohibited by the

[5] The court of appeals erred in suggesting that *Journeymen Pipe Fitters Local 392, supra,* and *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 779 F.2d 497 (9th Cir. 1985), aff'd, No. 85-2079 (Feb. 23, 1988), required the submission of fair representation claims to the Board. See Pet. App. A2. Indeed, in the former case, the court observed that "[u]nder current law, an employee who has not been fairly represented may seek relief in more than one forum * * *." 712 F.2d at 228. *Laborers Health & Welfare Trust Fund* did not address the issue.

National Labor Relations Act and *whether or not the lawsuit [is] bottomed on a collective agreement*" (emphasis added). Other courts of appeals and another panel of the Sixth Circuit have agreed that *Vaca* "establishes a broad immunity from preemption for all fair representation suits," not just cases that arise out of a breach of a collective bargaining agreement. *Lewis* v. *Local Union No. 100,* 750 F.2d at 1376. Accord, *e.g., Storey,* 759 F.2d at 523; *Beriault,* 501 F.2d at 264-266; *Smith,* 500 F.2d at 748-749.[6]

Second, *Local 100, Journeymen* v. *Borden, supra,* does not require dismissal of petitioner's claims (see Pet. App. A2). *Borden* held that the NLRA preempted the application of *state* law to a claim arising from discrimination in referrals, and the statement there that the NLRB's exclusive jurisdiction depends on the "conduct" in issue, as opposed to the "label affixed to the cause of action" (373 U.S. at 698), must be understood in that context. Even though fair representation claims based on *federal* law can

[6] This Court first recognized the fair representation doctrine in cases involving the negotiation of agreements which discriminated against certain union members (*e.g., Steele* v. *Louisville & N.R.R.,* 323 U.S. 192 (1944)), and the duty of fair representation is now understood to apply to the negotiation, administration, and enforcement of collective agreements (*Beck,* slip op. 6).

The court of appeals relied upon *Bagsby* v. *Lewis Brothers, Inc.,* 820 F.2d 799 (6th Cir. 1987). The plaintiff in that action sought relief in court for a breach of a collective bargaining agreement without first exhausting contractual grievance procedures. In that type of case, an employee concededly cannot prevail without demonstrating both that the union has breached the duty of fair representation in presenting the employee's grievance and that the employer has breached the collective bargaining agreement. See *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554, 570-571 (1976); *Clayton* v. *Automobile Workers,* 451 U.S. 679, 681, 685-687 (1981). A showing of employer breach is not necessary, however, where the relief an employee is seeking is not dependent on a breach of contract.

involve conduct that is arguably subject to the NLRA, those claims may nevertheless be judicially vindicated because "the particular *rule of law* sought to be invoked * * * is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes." *Lockridge,* 403 U.S. at 297-298 (emphasis added).[7]

In short, if petitioner's fair representation claim was colorable, the district court had jurisdiction under 28 U.S.C. 1331 and 1337 to reach the merits. In our view, the amended complaint did state such a claim. When a collective bargaining agreement establishes a referral system for employment of members of the bargaining unit, a union's operation of that system represents the "administration" of the collective bargaining agreement and is thus arguably within the scope of the union's duty of fair representation. *Beck,* slip op. 6. Several courts of appeals and the NLRB have held that a union breaches its duty to the members of a bargaining unit when it discriminates or acts arbitrarily or in bad faith in the operation of an exclusive hiring hall or referral system. *Smith* v. *Local 25,* 500 F.2d at 748-749; *Beriault* v. *Local 40,* 501 F.2d at 264-266; *Lewis* v. *Local 100, Laborers,* 750 F.2d at 1376; *Operating Engineers, Local 406 (Ford, Bacon & Davis),* 262 N.L.R.B. 50, 51, 57 (1982), enforced, 701 F.2d 504, 508-509 (5th Cir. 1983); *Pipefitters Local 392 (Kaiser Engineers),* 252 N.L.R.B. 417, 421-422 (1980); *Cell-Crete Corp.,* 288 N.L.R.B. No. 32 (Mar. 29, 1988). The Board has explained that "a labor organization must conform with and apply lawful contractual standards in the operation of the [hiring] hall and any

[7] As the Court cautioned in *Beck,* slip op. 6, "Employees, of course, may not circumvent the primary jurisdiction of the NLRB simply by casting statutory claims as violations of the union's duty of fair representation." See also *Lockridge,* 403 U.S. at 301.

departure from such standards which results in a denial of employment to an applicant for referral" constitutes the kind of "unfair, irrelevant, or invidious" treatment which violates the union's duty of fair representation—absent a showing that "the action was necessary for the effective performance of [the union's] function in representing its constituency." *Operating Engineers Local 406, supra,* 262 N.L.R.B. at 57. Though the referral system in this case may be nonexclusive, petitioner's fair representation claim was arguably valid and should have been decided on the merits, rather than through the application of the preemption doctrine.[8]

[8] A referral system is "exclusive" if the union has exclusive authority to provide workers to employers, even if that authority is limited to a specified period of time, such as 24 or 48 hours, or to a specified percentage of the work force. *Carpenters Local 608 (Various Employers),* 279 N.L.R.B. 747, 754 (1986), enforced on other grounds, 811 F.2d 149 (2d Cir. 1987), cert. denied, No. 86-1760 (Oct. 5, 1987). In this case, the district court found that employees were free to seek employment on their own, and petitioner does not appear to dispute that finding. Though the cases cited in text are not squarely on point with respect to such a nonexclusive system, at least a substantial argument could be made that, when a union undertakes to establish an optional referral system pursuant to the terms of a collective bargaining agreement as to which it is the employees' exclusive representative, its duty of fair representation extends to the operation of the referral system. The Board has held that a union operating a nonexclusive referral system violates Section 8(b)(1)(A) of the NLRA if it refuses to refer an employee because of the employee's exercise of rights protected by Section 7, 29 U.S.C. 157. See *Chauffeurs' Union, Local 923 (Yellow Cab),* 172 N.L.R.B. 2137 (1968); *Hoisting & Portable Engineers, Local 4 (Carlson Corp.),* 189 N.L.R.B. 366, 367 (1971), enforced, 456 F.2d 242 (1st Cir. 1972). It has not, as yet, ruled directly on whether such conduct would also violate the union's duty of fair representation. But see *Bricklayers' Local 8,* 235 N.L.R.B. 1001, 1007 (1978); *Carpenters Local 1016 (Bertram Constr.),* 272 N.L.R.B. 539 (1984). See also *Carpenters Local 608,* 279 N.L.R.B. at 747 n. 1 (finding an exclusive system, and thus declining to rely on an ALJ's conclusion

b. The court of appeals also erred in holding that petitioner's LMRDA claim was preempted.[9] In *International Brotherhood of Boilermakers* v. *Hardeman,* 401 U.S. 233 (1971), a union member claimed that he had been expelled from the union in violation of Section 101(a)(5) of the Act, 29 U.S.C. 411(a)(5). The union argued that, because the suit involved a claim that the union had discriminated in job referrals, the action was subject to the NLRB's exclusive jurisdiction. 401 U.S. at 239. This Court concluded that this argument had "no merit" (*ibid.*). After reviewing the principles underlying the preemption doctrine, the Court found that Hardeman's LMRDA claim implicated none of those principles. *Id.* at 240. The courts of appeals have uniformly concluded that a variety of LMRDA claims are not preempted. *Schmid* v. *United Brotherhood of Carpenters,* 773 F.2d 993, 995 (8th Cir. 1985); *Quinn* v. *DiGiulian,* 739 F.2d 637, 642-644 (D.C. Cir. 1984); *Vandeventer* v. *Local Union No. 513 of the International Union of Operating Engineers,* 579 F.2d 1373, 1377-1378 (8th Cir.), cert. denied, 439 U.S. 984 (1978); *Keene* v. *International Union of Operating Engineers, Local 624,* 569 F.2d 1375, 1379 (5th Cir. 1978). We believe, therefore, that the court of appeals erred when it held that petitioner's claim was preempted regardless of whether the

that the duty of fair representation attaches to administration of a nonexclusive system). See also *Hines* v. *Anchor Motor Freight,* 424 U.S. 554, 564 (1976) (duty of fair representation is equal in scope to authority conferred on exclusive bargaining agent by the NLRA). Because the lower courts in this case held that petitioner's fair representation claim was preempted, they did not reach these issues. If the Court were to grant review and reverse with respect to preemption, these issues could appropriately be addressed on remand.

[9] Although the court of appeals' opinion is not entirely clear, we read it as dismissing petitioner's LMRDA claim on two alternative grounds: (1) preemption and (2) the absence of a showing of "discipline" within the meaning of the Act.

Union's alleged discrimination was "described * * * as a violation of the LMRDA's bill of rights." Pet. App. A2.

c. The court of appeals' decision that petitioner's fair representation and LMRDA claims were within the exclusive jurisdiction of the NLRB is a substantial departure from previously settled preemption doctrine. The weight of authority on the other side of this issue and the brevity of the court's reasoning may deprive this decision of lasting significance. But especially in view of the court of appeals' decision to publish its opinion, as well as its mistaken reliance on the *Borden* decision, we believe that review by this Court—perhaps even summary review—is appropriate to resolve the conflict between this decision and the decisions of this Court and other courts of appeals.

2. The court of appeals also held that petitioner's LMRDA claim was invalid on its merits because petitioner "did not demonstrate that he was improperly 'disciplined,' a crucial element to a LMRDA claim." Pet. App. A3. Relying principally on *Finnegan* v. *Leu, supra,* the court stated that the LMRDA "is intended to secure the rights of members in their status as union members and does not secure other rights related to a member's employment" and that "[h]iring hall referrals are not a function of union membership" (Pet. App. A3). In our view, the reasoning of *Finnegan* v. *Leu* does not justify the court of appeals' holding. Moreover, whether or not the complaint alleged that petitioner was "disciplined," it may state an independent claim based upon an alleged infringement of petitioner's rights within the meaning of Section 102 of that Act, 29 U.S.C. 412.

Section 101(a) of the LMRDA, 29 U.S.C. 411(a), establishes a "bill of rights" for union members. Among those rights are the right to free speech and the right to specified procedural due process before one is "fined, suspended,

expelled, or otherwise disciplined" by a union. 29 U.S.C. 411(a)(2), 411(a)(5). Under Section 102 of the Act, 29 U.S.C. 412, a person whose rights "have been infringed" by a violation of these provisions may seek relief in a federal district court. Section 609 of the Act, 29 U.S.C. 529, makes it unlawful for a union "to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter [29 U.S.C. 401-531]." A violation of Section 609 is also actionable under Section 102.

Citing all of these provisions, petitioner's amended complaint alleges in essence that the Union has "disciplined" him for his political activities by discriminating against him in job referrals (Pet. App. A21). It concludes (*ibid.*):

> Plaintiff's discriminatory treatment in job referrals * * * has been part of widespread, improper discipline for political opposition in violation of 29 U.S.C. 411(5) and 29 U.S.C. 529.

In our view, *Finnegan* v. *Leu* does not foreclose such a claim.

In *Finnegan,* a newly elected president of a local union discharged the local's business agents and appointed replacements loyal to him. The agents who had been discharged brought an action under the LMRDA, alleging that they had been "otherwise disciplined" for their political support for the former president in violation of Section 609. This Court affirmed the dismissal of the complaint, holding that "removal from appointive union employment is not within the scope of those union sanctions explicitly prohibited by § 609 [of the LMRDA]." 456 U.S. at 439. The Court also held that the discharges could not be challenged by alleging an "infringement" of the agents' rights within the meaning of Section 102 of the Act, since those rights were not intended to "restrict the freedom of

an elected union leader to choose a staff whose views are compatible with his own." *Id.* at 441.

The court of appeals' decision extends *Finnegan* v. *Leu* to actions by a union which deprive a union member of employment, not by the union, but by employers in a bargaining unit. We do not believe that *Finnegan* v. *Leu* should be read this broadly. The term "otherwise disciplined" in Sections 101(a)(5) and 609 of the statute would seem to encompass a union member's removal from or demotion on an out-of-work list based upon a violation of a union rule or policy or the member's intra-union political activity. Indeed, it would be anomalous to conclude that the LMRDA prohibits a union from expelling a member from the union without due process or for expressing political opposition to a union's leadership, but not from excluding that member from a union hiring hall. In *Finnegan,* 456 U.S. at 435-436, this Court noted that the LMRDA "placed emphasis on the rights of union members to freedom of expression without fear of sanctions by the union, which in many instances could mean loss of union membership and in turn loss of livelihood." If Congress was concerned about union discipline that could lead indirectly to "loss of livelihood," it is unlikely that it would have exempted union job referral systems from the Act, since discipline imposed through referrals affects livelihood directly.

To be sure, in *Finnegan,* this Court relied on the fact that in Section 609 the phrase "otherwise disciplined" follows three "punitive actions"—fine, suspension, and expulsion—which are "taken against union members as members." 456 U.S. at 437-438. To the extent that hiring hall referrals are available to non-union members, discrimination in such referrals may not neatly fit this description. Nevertheless, at a minimum, we believe that "discipline" for purposes of the LMRDA includes a sanction imposed by a union on a union member, through the

operation of a hiring hall or referral system, if the purpose of that sanction is to enforce union rules or policies, or to punish disfavored political positions.[10]

Moreover, even if discrimination in referrals did not constitute "discipline," retaliation for intra-union political activity taking that form should nevertheless be actionable

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[10] In *Miller* v. *Holden,* 535 F.2d 912, 914-915 (1976), the Fifth Circuit also applied the maxim of *ejusdem generis* to the phrase "fined, suspended, expelled, or otherwise disciplined" in Sections 101(a)(5) and 609 of the Act and concluded that an action affecting a member's employment could constitute "discipline" when (535 F.2d at 915):

> (1) it is undertaken under color of the union's right to control the member's conduct in order to protect the interests of the union, and (2) it directly penalizes him in a way which separates him from comparable members in good standing.

Commentators have differed on the extent to which union actions reducing a member's employment opportunities constitute discipline for purposes of the Act. Compare Etelson & Smith, *Union Discipline Under the Landrum-Griffin Act,* 82 Harv. L. Rev. 727, 732-735 (1969) (such actions constitute discipline when "undertaken under color of the union's right to control the member's conduct in order to protect the interests of the union"), and Beaird & Player, *Union Discipline of its Membership Under Section 101(a)(5) of Landrum-Griffin: What is "Discipline" and How Much Process is Due?,* 9 Ga. L. Rev. 383, 392 (1975) ("The idea that 'discipline' includes only union action which affects membership status is unnecessarily narrow."), with Comment, *Applicability of LMRDA Section 101(a)(5) to Union Interference with Employment Opportunities,* 114 U. Pa. L. Rev. 700, 702 (1966) ("interference with employment opportunities should be excluded from the scope of section 101(a)(5)").

Concededly, not every action by a union adverse to a member can be characterized as "discipline." While the confines of "discipline" are not altogether clear, that term ordinarily refers to actions designed to enforce union rules, policies, or political viewpoints. The term derives some meaning, moreover, from the fact that "discipline" triggers a right to procedural due process under Section 101(a)(5). Presumably, an adverse action must be of a type that would make such procedures meaningful.

under Section 102 of the Act as an "infringement" of the member's protected rights of free speech and assembly. "[A] litigant may maintain an action under § 102—to redress an 'infringement' of 'rights secured' under Title I—without necessarily stating a violation of § 609." *Finnegan* v. *Leu*, 456 U.S. at 439. In *Sheet Metal Workers' Int'l Ass'n* v. *Lynn*, No. 86-1940 (Jan. 18, 1989), the Court framed the test for an action under Section 102 as follows (slip op. 7 (quoting *Finnegan* v. *Leu*, 456 U.S. at 441)):

> Whether such interference [with a right protected by Section 101(a)] gives rise to a cause of action under § 102 must be judged by reference to the LMRDA's basic objective: "to ensure that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections."

Under this test, discrimination in hiring hall referrals based upon protected intra-union political activity of the sort referred to in petitioner's complaint should be redressible under Section 102. Certainly, none of the considerations supporting this Court's determination in *Finnegan* v. *Leu*—that discharges from appointed policymaking positions in a union are exempt from the LMRDA—applies to such a case. See 456 U.S. at 441-442.[11]

[11] Indeed, in *Finnegan* v. *Leu*, 456 U.S. at 441 n.11, this Court reserved the question whether Section 102 would apply to discharges of "nonpolicymaking and nonconfidential employees." And in *Lynn*, *supra*, the Court held that elected union officials may not be discharged on the basis of their protected political activity. It would be anomalous if the Act prohibited discharges of these categories of employees from union positions, but did not apply to retaliatory refusals to place rank-and-file union members in positions with other employers.

Though not squarely inconsistent with holdings of the Sixth Circuit or other courts of appeals,[12] the decision in this case extends the reasoning of *Finnegan* v. *Leu* farther than any other decision has taken it. In *Murphy* v. *International Union of Operating Engineers, Local 18*, 774 F.2d 114 (1985), cert. denied, 475 U.S. 1017 (1986), a different panel of the Sixth Circuit held that a union's refusal to register a member's card in a union-operated job referral system, based upon the member's alleged theft of an election control list, was "discipline" for purposes of the LMRDA. Rejecting the claim that this action was "employment-related" and thus exempt from the LMRDA under the reasoning of *Finnegan* v. *Leu*, the court explained (*id.* at 123-124):

> The Union's action in foreclosing Murphy's participation in the work referral program was a sanction which set him apart from other members in good standing. It unquestionably affected his membership rights. Judge Lambros correctly held that the removal of the card was discipline impermissibly imposed without a full and fair hearing.

The court also held that, although the district court had ruled that discrimination in the referral system based upon a member's union political activity was not "discipline," that type of retaliation was directly actionable under Section 102 of the Act (*id.* at 122-123).

Two other courts of appeals have held that a union's suspension of a member from a job referral system because the member had violated the terms of a collective bargaining agreement did not constitute "discipline" for

[12] The rationale of the court of appeals' decision is, however, at odds with the reasoning of at least one pre-*Finnegan* decision in the Fifth Circuit. *Keene* v. *International Union of Operating Engineers, Local 624, AFL-CIO*, 569 F.2d at 1379-1380.

purposes of Section 101(a)(5) of the Act. *Turner* v. *Local Lodge No. 455 of the International Brotherhood of Boilermakers*, 755 F.2d 866 (11th Cir. 1985) (observing illegal picket line); *Hackenburg* v. *International Brotherhood of Boilermakers*, 694 F.2d 1237 (10th Cir. 1982) (wildcat strike). Both courts held that, under the reasoning of *Finnegan* v. *Leu*, the enforcement of a collective bargaining agreement did not affect a union member's rights or status as a member of the union and did not implicate the purposes of the LMRDA. 755 F.2d at 869-870; 694 F.2d at 1239. While there is language in both opinions suggesting that discrimination in a job referral system open to both union members and non-members cannot be considered "discipline" for purposes of the LMRDA, neither decision compels that result. In *Turner*, for instance, the court stated that, if the employee had alleged "retaliation for [the] exercise of a protected right, the case might be different." 755 F.2d at 870. See *Moore* v. *Electrical Workers Local 569*, 653 F. Supp. 767, 770 (S.D. Cal. 1987) ("It simply does not follow that a given action [discrimination in hiring from an out-of-work list] does not affect a member's rights or status simply because non-members may belong to the list."). Since petitioner has alleged that the Union retaliated against him because of his intra-union political activity and since any adverse action the Union has taken cannot be justified as a means of enforcing a collective bargaining agreement, *Turner* and *Hackenburg* do not support the court of appeals' decision in this case.

In conclusion, we do not believe that *Finnegan* v. *Leu* forecloses petitioner's claim that the union discriminated against him in job referrals in retaliation for his intra-union political activity. Even if retaliation of this type is not "discipline" for purposes of Section 609, it should remain actionable under Section 102 as an "infringement" of petitioner's rights under Section 101(a)(2) of the Act.[13]

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[13] We note that the last question presented in the petition (Pet. i), which focuses on the issue of "discipline," may not encompass the issue whether the Union "infringed" petitioner's rights within the meaning of Section 102. But we believe that a fair reading of the complaint, with its invocation of Section 102 and the LMRDA bill of rights, does raise that issue, and we therefore suggest that, if the Court decides to grant plenary review, the issue is an appropriate one for consideration.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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